OCBC BANK (MALAYSIA) BHD

v.

WEE KIM KWEE & ANOR

HIGH COURT MALAYA, KOTA BHARU
ARIFIN ZAKARIA J
[ORIGINATING SUMMONS NO: 24-93-1994]
22 APRIL 1998

CIVIL PROCEDURE: *Parties - Locus standi - Order for sale of charged land - Application for extension of time to pay purchase price - Mode of commencement - Application by way of summon-in chambers - Whether improper - Whether non-compliance with procedure - Whether to apply by way of originating summons - Rules of the High Court 1980, O. 2 r. 1*

LAND LAW: *Charge - Order for sale - Extension of time to pay purchase price - Whether application devoid of merits - Purchaser aggrieved by private caveat entered against land - Whether could apply for removal of caveat - National Land Code 1965, s. 327*

The defendants were the registered owner of a piece of land in Kelantan ('the said land') and had charged the said land to the plaintiff as security for a loan granted by the plaintiff to the borrower. The borrower failed to pay up the loan and the plaintiff obtained an order for sale of the said land. The said land was finally auctioned to the applicant who paid 10% of the purchase price. Under cl. 8 of the conditions of sale, the applicant was required to settle the balance 90% of the purchase price within 90 days from the date of sale. The applicant was unable to comply with cl. 8, and so applied by way of summons-in-chambers for extension of time to pay the balance purchase price. Two grounds were cited by the applicant to support the application, namely: (i) that there were two other private caveats lodged against the said land; and (ii) that the defendants had applied to set aside the auction. The applicant, however, was not a party to the Originating Summons ('the OS') under which the order for sale was made, and that being so, the application for extension of time was rejected by the learned Senior Assistant Registrar. The applicant appealed, and the issues that arose were: (a) whether the applicant who was never a party to the OS had the *locus standi* to make this application; (b) whether the procedural defect could be remedied by the court under its discretionary powers pursuant to O. 2 r. 1 Rules of High Court 1980 ('the RHC'); and (c) whether there was sufficient merit in the application by the applicant.

Held:

[1] A summon in chambers is only issued in a pending cause or matter on the application of any of the parties to the cause or matter. A person who is not a party to a pending cause or matter has no *locus standi* to make such an application. The applicant was never a party to the OS and did not have the *locus standi* to make the application. The right procedure to adopt was to proceed by way of an originating summons.

[2] It is a rule of fundamental importance that a person who is not a party to a proceeding is not at liberty to intervene in the proceeding without first obtaining leave of the court. The discretion conferred by O. 2 r. 1 of the RHC cannot be exercised in favour of the applicant.

[3] The declaration of sale clearly stated that the said land was subject to the two private caveats. Therefore, the applicant could not now use that as a reason in support of his application. To allow the applicant to postpone the payment of the balance sum would tantamount to allowing him to go back on his bargain. Such delay would prejudice the defendants who would be charged the additional interest on the amount remaining outstanding with the plaintiff.

[4] The fact that the defendants had applied to set aside the sale would not be a valid reason to support the applicant's application. A purchaser at a public auction ought to have realised that an auction sale is liable to be set aside by the court in appropriate cases. It is highly unjustified for the applicant to use the said application by the defendants as a ground to support his application.

[5] In the event that a purchaser is aggrieved by any private caveat entered against the land, he is at liberty to apply to the court under s. 327(1) of the National Land Code 1965 to have the caveat removed.

[Appeal dismissed.]

Case(s) referred to:

Bernstein v. Jackson [1982] 1 WLR 1082 ***(refd)***

Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd [1992] 4 CLJ 2212 ***(cit)***

Harkness v. Bell's Asbestos and Engineering Ltd [1967] 2 QB 729 ***(cit)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(refd)***

Mohamed Ismail v. Tan Sri Hj Osman Saat & Ors [1982] 1 CLJ 553 ***(refd)***

Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 2 MLJ 129 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2(1), O. 19 r. 7(1), O. 92 r. 4
National Land Code 1965, ss. 259(3), 327(1)

For the applicant - Abdullah Hamzah; M/s Wrigglesworth & Co
For the defendants - Noraini Ismail; M/s Aini Hayati & Assoc

Reported by Ling Hea Hoon

JUDGMENT

Arifin Zakaria J:

This is an appeal against the decision of the learned SAR in rejecting the application of the applicant, who is the successful bidder of the land known as Lot 196, Mukim Enggong, Daerah Kuala Krai, Negeri Kelantan, Hakmilik Geran No. 20562, ("the said land"), for an order that the time for payment of the balance of the purchase price be extended for a period of 60 days with effect from 28 December 1997.

The Background Facts

The background facts leading to this application are briefly as follows. The defendants are the registered owner of the said land. The plaintiff bank had granted a loan for the sum of RM950,000 to Aik Hong Chan Trading on the security of the said land. The borrower failed to pay up the said loan. On 16 November 1995, the plaintiff obtained an order for sale of the said land. For the purpose of the auction the SAR fixed the reserved price at RM1,674,000. After several postponements the said land was finally auctioned off to the applicant at the reserved price. The applicant paid the sum of RM167,600 being 10% of the purchase price and under cl. 8 of the conditions of sale the applicant is required to pay the balance 90% within a period of 90 days from the date or sale.

The Procedure

This application was made by summons in chambers filed by the applicant in the O.S. under which the order for sale of the said land was made. This gives rise to procedural issue whether the applicant who was never a party to the O.S. has the *locus standi* to make this application.

This issue was never raised by either party. However, I am of the opinion that this issue should appropriately be addressed by the court before I consider the merits of this application.

As I understand it, a summon in chambers is only issued in a pending cause or matter on the application of any of the parties to the cause or matter. Thus a person who is not a party to a pending cause or matter has no *locus standi* to make such an application. Going by that principle I am of the view that the applicant who was never a party to the originating summons does not have the *locus standi* to make this application. The right procedure that the applicant should have adopted is to proceed by way of an originating summons. However, could this procedural defect be remedied by the court under the discretionary powers conferred by O. 2 r. 1 of the Rules of the High Court 1980 ("RHC"). The said O. 2 r. 1 of the RHC provides:

> (1) Where, in beginning or purporting to begin any proceeding or at any stage in the course of or connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an inregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
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> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its power under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.
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> (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

Under this new rules the old distinction between nullities and irregularities has since been abolished. (See *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729). Any failure to comply with the rules in the commencement of any proceeding is now to be treated as an irregularity and shall not nullify the proceeding. In the case of *Mohamed bin Ismail v. Tan Sri Haji Osman Saat & Ors* [1982] 1 CLJ 553; [1982] 2 MLJ 133 the court invoked the powers and exercise its discretion under O. 2 and O. 92 r. 4 of the RHC and direct the motion to proceed and be considered on its merits eventhough the court was of the view that the procedure adopted by the applicant by motion instead of by writ was wrong. The court held that it merely rendered the proceedings irregular but by no means void. However, in *Syarikat Joo Seng & Anor v. Habib Bank Ltd* [1986] 2 MLJ 129 where the plaintiff without obtaining leave of the court or a judge entered a judgment in default of defence against the defendant, the Supreme Court held that the

respondents/plaintiffs had no right to enter a judgment in default of defence under O. 19 r. 7(1) without the leave of the court or a judge, and O. 2 r. 1 of the RHC does not apply to a default judgment or one obtained contrary to O. 19 r. 7(1) of the RHC.

What was emphasised in that case was that the plaintiffs had no right to enter the default judgment, therefore, O. 2 r. 1 of the RHC could not apply. Similarly in the English case of *Bernstein v. Jackson* [1982] 1 WLR 1082, it was held the non renewal of a writ was not an irregularity which could be dealt with under RSC O. 2 r. 1 (which is in *pari materia* with our O. 2 r. 1). The English Court of Appeal further held that, in any event, the failure to renew a writ within the time specified in the rule was a defect so fundamental that it was not a proper case for exercise of discretion to amend under O. 2 r. 1.

In the present case the applicant who was never a party to the O.S., without leave of the court to intervene, made this application for extension of time to make payment of the balance of the purchase price. Under what specific order or rules of court (if any) he made this application is beyond me. Even if the applicant is allowed by rules of court to make this application by summons in chamber I would think the applicant should firstly apply to court for leave to intervene in the proceedings. I think, it is a rule of fundamental importance that a person who is not a party to a proceeding is not at liberty to intervene in the proceeding without first obtaining leave of the court. I am, therefore, of the view that the discretion conferred by O. 2 r. 1 of the RHC cannot be exercised in favour of the applicant.

On The Merits

It is now settled law that a purchase of land at a public auction may be granted extension of time to make payment of the balance purchase price even after the period for such payment had expired. This legal proposition found support in the Supreme Court decision in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. At p. 309 Wan Yahya SCJ in delivering judgment of the court stated:

> The order for sale confers on the chargee only the statutory rights to a judicial sale. A sale under s. 256 or s. 260 of the NLC is a judicial sale ordered by court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights, may intervene to set aside the sale in the event of fraud, impropriety of the breach of any statutory or contractual terms of the sale. We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's power to order the

sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the terms or conditions must likewise be exercised.

In our case the defendants/chargors strongly objected to this application. However, the plaintiff/chargee whom I believe was duly served with this application, was not represented at the hearing both before the SAR and before me. In the circumstances, I take it that the plaintiff/chargee is prepared to abide by the court's decision on the matter. The grounds in support of this application appear in the affidavit of the applicant affirmed on 18 December 1997, the pertinent parts of which are as follows:

4. Selanjutnya, terdapat perkembangan baru di mana saya difahamkan bahawa pihak defendan di atas telah memasukkan dan memfailkan permohonan Saman Dalam Kamar untuk membatalkan dan/atau mengenepikan perintah lelong yang telah dibuat pada 28 haribulan September, 1997 yang mana permohonan tersebut telah di tetapkan untuk pendengaran pada 22 haribulan Disember, 1997.

5. Saya juga percaya dan telah dinasihati bahawa terdapat 2 kaveat persendirian yang telah di masukkan berasingan masing-masingnya oleh Ng Sioe Gan pada 28-5-97 Bil. siri 38/97 Kaveat persendirian jilid 6 Folio 54 dan Lim Soon Seang pada 17 haribulan Jun 1997 Bil siri 44/97 Kaveat Persendirian Jilid 6 Folio 59 dan kaveat-kaveat tersebut masih belum dibatalkan.

6. Selanjutnya pada 5 haribulan Oktober, 1997, defendan-defendan sendiri telah memasukkan Kaveat Persendirian Bil. siri No. 80/97 Kaveat Persendirian Jilid 6 Folio 91 ke atas kesemua tanah yang tersebut.

7. Saya percaya bahawa kaveat-kaveat itu perlu dibatalkan terlebih dahulu sebelum pembayaran sepenuhnya dibuat oleh saya.

The defendants/chargors in his affidavit in reply contended that the private caveats bearing presentation nos. 38/97 and 44/97 had been entered prior to the date of the sale of the said land and the sale was expressly stated to be subject to the said caveats. Therefore, the said caveats could not properly be used as a basis for the applicant in refusing to pay up the balance of the purchase price within the time fixed for such payment. It is also contended on behalf of the defendants/chargors that the application by the chargor to set aside the auction is also not a proper ground to support this application. Having considered them and the submissions of counsel I am inclined to agree with the defendants/chargors.

Firstly, it is not in dispute that the declaration or sale clearly stated that the said land was subject to the two private caveats, therefore, the applicant could not now use that as a reason in support of his applicant. To allow the applicant to postpone the payment of the balance sum would tantamount to allowing him to go back on his bargain. It cannot be denied that such delay would prejudice the defendants/chargors in that the defendants/chargors would be charged the additional interest on the amount remaining outstanding with the plaintiff.

As for the application by the defendants/chargors to set aside the sale, I am of the opinion that this again is not a valid reason to support the applicant's application. A purchaser at a public auction, as the applicant herein, ought to have realised that an auction sale is liable to be set aside by the court in appropriate cases. Therefore, it is highly unjustified for the applicant to use the said application by the defendants/chargors as a ground supporting his application. Likewise I am of the opinion that the entry of the private caveat by the defendants/chargors against the said land is not a sufficient ground to support the applicant's application. The obligation of the applicant is clearly spelt out in cl. 8 of the conditions of sale which states that purchaser is to pay the balance of the purchase price to the deputy registrar of the High Court, Kota Bharu within 90 days from the date of sale. Section 259(3) of the NLC provides that:

> s. 259 (3) The purchaser at the sale shall, upon payment to the said officer of the full amount of the purchase, be entitled to receive from him-
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> (a) a certificate in form 16F that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by section 267, be registrable by the purchaser as if it were an instrument of dealing); and
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> (b) if deposited with the Court pursuant to paragraph (b) of sub-section (2) of section 258, the issue document of title to the land or, as the case may be, duplicate lease.

The above provisions clearly spell out the rights of the purchaser on payment of the full amount of the purchase price. In the event that the purchaser is aggrieved by any private caveat entered against the said land he is at liberty to apply to the court under s. 327(1) of the NLC to have the caveat removed. See *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd* [1992] 4 CLJ 2212; [1992] 2 MLJ 650.

For the above reasons I find that the application herein is devoid of any merit and I therefore dismissed the appeal with costs.